Supreme Court, U.S.
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No. 02-1776

IN THE

Supreme Court of the United States

LESTER I. TENNEY, *et al.*,

Petitioners,

v.

MITSUI & CO., LTD., MITSUI & CO. (USA), INC., MITSUI MINING CO. LTD., and MITSUI MINING USA INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* VETERANS OF FOREIGN WARS OF THE UNITED STATES, THE AMERICAN DEFENDERS OF BATAAN AND CORREGIDOR, THE AMERICAN EX-PRISONERS OF WAR, THE AMERICAN GI FORUM, THE BATAAN VETERANS ORGANIZATION, THE BATTLING BASTARDS OF BATAAN, THE CATHOLIC WAR VETERANS OF THE UNITED STATES OF AMERICA, THE CENTER FOR INTERNEE RIGHTS, THE DISABLED AMERICAN VETERANS, THE FLEET RESERVE ASSOCIATION, AND THE LEGION OF VALOR OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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INTRODUCTION

This brief[1] is submitted on behalf of the Veterans of Foreign Wars of the United States, the American Defenders of Bataan and Corregidor, the American Ex-Prisoners of War, the American GI Forum, the Bataan Veterans Organization, the Battling Bastards of Bataan, the Catholic War Veterans of the United States of America, the Center for Internee Rights, the Disabled American Veterans, the Fleet Reserve Association, and the Legion of Valor of the United States of America, to urge this Court to grant the Petition for a Writ of Certiorari in the case of *Lester Tenney, et al, v. Mitsui & Co. (USA), Inc., et ux* ("*Tenney*") [Docket No. 02-1776], in order to settle important questions of law, correct a grave injustice, and secure uniformity of decision.

STATEMENT OF INTEREST

Amici are veterans groups who act on behalf of, serve, and protect the rights of past, present and future members of the United States armed forces. Combined, amici represent approximately five million (5,000,000) veterans our our armed forces.

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[1] Amici state that this brief has been prepared in whole by C. Daniel Carroll, Counsel of Record for amici. No person or entity, other than amici, their members, or their counsel, have made a monetary contribution to the preparation or submission of the brief. All parties before the Court have consented in writing to the filing of this brief. A copy of that consent is submitted herewith.

The Veterans of Foreign Wars of the United States ("VFW") was founded in 1899. One of the fundamental purposes of the VFW, as expressed in its Congressional Charter [36 U.S.C. § 113], is "to assist worthy comrades; to perpetuate the memory and history of our dead; and to assist their widows and orphans." Fulfilling that promise and purpose, the 1.9 million members of the VFW are actively engaged in protecting the rights of America's veterans and assuring that they receive the care and recompense they deserve for their service to the Country in defense of our freedoms.

The American Defenders of Bataan and Corregidor ("ADBC") are a group of more than 5,000 men and women who served on Bataan, Corregidor, the Philippine Archipelago, Wake Island, Midway, Guam, Dutch East Indies, the Asiatic Fleet during World War II. The ADBC's members became Prisoners of War during the months between December 1941 to May 1942, and were held in captivity until September/October 1945. Through tremendous sacrifice, members of the ABDC stood together against overwhelming odds and were able to hold off the enemy for six months at the outbreak of World War II, enabling mobilization back home, and giving America the ability to fight an offensive war. Today, the ABDC works to promote and protect the interests and memories of these valiant heros.

The American Ex-Prisoners of War is a national organization for American citizens who were captured by the enemy. Membership is open to all former prisoners of war from any theater in any war, all former civilian internees, and to the families of such persons. Founded on April 14, 1942, the organization was Congressionally chartered [36 U.S.C. § 2101] on August 10, 1982. At the present time, the American Ex-Prisoners of War has over 300 Chapters and State Departments, representing over 30,000 members. Its purpose

is its motto: "We exist to help those who cannot help themselves." The organization has a keen interest in seeing that the rights of prisoners of war are upheld in our courts and not denied for the purpose of political expediency.

The American G.I. Forum ("AGIF") is a Congressionally Chartered veterans organization [36 U.S.C. § 21001] founded in March 1948 to protect the rights of Hispanic war veterans[2] as American veterans. The AGIF was formed initially to combat discrimination against Hispanic veterans in housing,

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[2] Tens of thousands of Hispanics fought to defend the United States and the free world during World War II. They distinguished themselves in battles at Bataan, Attu, North Africa, in Europe and in the Pacific. Many died, and many suffered the indignities and horrors of forced labor for the profit of private Japanese companies.

Of particular note, the 200th/515thCoast Artillery Regiment, a national guard unit from New Mexico which was federalized and stationed in the Philippines in 1941 fought valiantly in Bataan. Approximately one-third of the men in this Regiment were Hispanic, with about 79 Native Americans, as well. When the Japanese bombed Clark Field and Fort Stotsenberg on the Philippine Islands just hours after the attack at Pearl Harbor, the 200th Coast Artillery (anti-aircraft) was the first to fire on the enemy. The regiment fought fiercely through the next four months, although starving and diseased, until American and Filipino forces were surrendered at Bataan on April 9, 1942, with Corregidor falling a month later.

Of the 1,800 men in the Regiment, less than one-half survived the war and one-third of these were dead within one year of returning to the U.S. Today, only about 90 of these brave men remain. These Hispanic soldiers returned to the United States secure in their belief in the American dream, which included the protection of our U.S. Constitution, and the security afforded by our judicial system.

employment and education, and has always believed, and fought, to ensure that all veterans are treated fairly and equally, and that all veterans are all afforded the protection of the American system for which they fought. The AGIF has continuously maintained advocacy for Hispanics as its primary role, and is actively involved in various other issues important to the Hispanic community such as employment, housing, and civil rights. These activities are supported by the respected voice and advocacy of a national membership of more than 140,000 proven American patriots.

The Battling Bastards of Bataan ("BBB") is an organization dedicated to the brave warriors who served in the battle fields of Bataan, Philippines, during World War II. Its mission is to perpetuate the story of Bataan and to leave to our descendants the truth as its members knew it. The BBB serves as a reminder that the precepts of courage, devotion to duty, and sacrifice displayed by the men and women of Bataan, both Filipino and American, have not and will not become outmoded. Its motto is "Keep the faith in our country as exhibited by those men and women who fought in defense of Bataan, Philippines in 1942. Freedom is not free."

The Bataan Veterans Organization ("BVO") is composed of veterans who survived the bloody battles in the defense of Bataan and Corregidor in the Philippine Islands, and then the Bataan Death March. The BVO's members also survived hell ships that transported them to the mainland of Japan and Korea; and years of the most inhumane treatment known to mankind, as prisoners of war.[3]

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[3] Many in the BVO, like the members of the American GI Forum discussed in footnote 2, belonged to the New Mexico Army National Guard's 200th Coast Artillery Regiment.

The Catholic War Veterans of the United States of America ("CWV") is a Congressionally Chartered association [36 U.S.C. § 2601] which was formed in 1935. Its Charter was signed by President Reagan on August 17, 1984. An organization of more than 25,000 veterans, the CWV's mission is to make the entire nation acutely aware of the struggle and needs of its veterans, their widows and children, to educate the public on the needs and sacrifices of veterans and their families, to promote patriotism and allegiance to the Constitution, and to advance peace and respect for one another, particularly the family. CWV's members cooperate to the fullest extent with all veterans organizations in order to better serve the interests of the men and women who served in each of the wars in which our nation has been involved.

The Center for Internee Rights, Inc. ["CFIR"] is a non-profit corporation formed in 1990 to represent the plight of the Allied Prisoners of War, Civilian Internees, and those in hiding who suffered untold deprivation by the Imperial Japanese Forces in World War II, and others who suffered private deprivation at the hands of private companies. The CFIR's primary agenda is to seek an apology and compensation for its members and other victims from the Japanese Government and the private companies who perpetrated these wrongs. The CFIR also provides information and research data to victims seeking legal claims for slave labor, forced labor and loss of personal property and assets.

The Disabled American Veterans ("DAV") was formed in1920 and chartered by Congress in 1932 [36 U.S.C. § 90]. The DAV is the official voice of America's service-connected disabled veterans, a strong, insistent voice that represents all of America's 2.1 million disabled veterans, their families and their survivors. Because it serves those who were disabled in

service of their government, the DAV has special concern for those who were systematically tortured, starved, beaten, denied medical care, and used as a forced laborers and slaves of private multinational and/or Japanese corporations during World War II, and who have never been paid wages or other restitution for their forced labor.

The Fleet Reserve Association ("FRA") is a nonprofit organization comprised of enlisted personnel (active duty, reserve, and retired) of the U.S. Navy, Marine Corps and Coast Guard. The FRA membership, 140,000 strong, is devoted to promoting and protecting the interests of personnel serving in the sea services. Since 1924, the FRA has been a leading advocate on Capitol Hill for the men and women who serve on active duty, in the reserve, or have joined the military retired community.

The Legion of Valor was organized on April 23, 1890, in Washington, DC, by a group of Civil War and Indian War Campaign veterans who were recipients of the Medal of Honor. Membership was subsequently enlarged to include recipients of the Army Distinguished Service Cross, the Navy Cross, and the Air Force Cross. At its inception, the name was "The Medal of Honor Legion." On August 4, 1955, Congress chartered [36 U.S.C. § 613] "The Army and Navy Legion of Valor of the United States," and on June 21, 1961, the name of the organization became the "Legion of Valor of the United States of America, Inc." The Legion of Valor's purpose is to advance the interests of members of the armed forces of the United States, to enhance their prestige and understanding, and to stimulate patriotism in the minds of youth as well as the national pride in the interest of the armed forces of the United States.

During this time when our fighting forces are actively engaged in wars around the world, the joint amici urge the United States Supreme Court to undertake review of the decision in *Deutsch v. Turner*, 317 F.3d 1005, *as amended* at 324 F.3d 692 (9th Cir. 2003) ["*Deutsch*"].[4] The Ninth Circuit's opinion in *Deutsch* has denied important rights to Petitioners, a group of World War II American Prisoners of War who were forced to work ***without pay*** for ***private***[5] Japanese companies, while being systematically starved, beaten and denied medical care. The Respondents herein, including global conglomerates such as Mitsui, Mitsubishi, and their related entities, unjustly enriched themselves during the war by employing the forced slave labor of these and other American Prisoners of War. Yet, these multinational companies have never apologized or paid any restitution or other compensation to our brave veterans.

It is of vital importance that private foreign entities know that they cannot treat American Prisoners of War horrifically and in contravention of international law without resulting liability, nor can they hide behind International Treaties which were not expressly enacted for their benefit. In granting certiorari and reversing the decision of the Ninth Circuit in *Deutsch*, this Court will ensure that the men and women who are and have been called to defend our Country are not deprived of the legal, moral and ethical rights to which they are entitled. It is a grave injustice to deny the

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[4] The *Deutsch* opinion, as amended, is set forth in the Petition at pages 1-a through 68-a, and is incorporated herein by reference.

[5] Importantly, these companies were not nationalized, nor were they the agents of the Japanese government. They were "*private*" in every sense of the word.

right of compensation to our aging World War II veterans[6] who so willingly and steadfastly secured peace for the world when they were called to do so, and who in the course of that mission were tortiously abused by private Japanese entities. Many of these Prisoners of War who were worked to death or near death for global giants such as Mitsui and Mitsubishi were survivors of the Bataan Death March before they were turned over to, and made the responsibility of, these private companies to work in their mining operations. To allow these private companies to profit from the forced slave labor of American Prisoners of War violates every notion of justice and fair play accepted in the civilized world. This Honorable Court should not let such an injustice stand.

REASONS FOR GRANTING THE WRIT

A. Review is Needed to Resolve Important Issues of Law

The *Deutsch* decision attempts to deny former prisoners of war their rights under a California law which specifically extends the statute of limitations for filing claims involving slave and forced labor during World War II. *California Code of Civil Procedure*, Section 354.6.[7] Denial of civil redress is a serious question of law, which should not be decided lightly. For this reason alone, the Court should grant the

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[6] Virtually all of the Petitioners are over eighty (80) years old. Many are infirm and disabled as a result of their treatment by Respondents. This Petition represents their last chance to obtain remuneration for Respondents' exploitation.

[7] The full text of Section 354.6 is set forth in the Petition at pages 122-a through 123-a, and is incorporated herein by reference.

requested Writ of Certiorari. Moreover, vitiating a statute which was passed by the California Legislature to establish important public policy principles - - to protect the rights of California residents by allowing common law and statutory wage and tort claims against companies that are presently doing business in California, and which engaged in extremely harmful behavior during World War II - - raises questions of the utmost legal, moral and social importance.

Consider the effect of the *Deutsch* decision on our present day and future fighting forces. If the Ninth Circuit's decision stands, they will know that they will have no redress for intentional harms perpetrated upon them by private entities while they are defending their Country. In effect, they are asked to risk the ultimate sacrifice, knowing that the Courts of their homeland will protect foreign non-governmental entities who exploit them for private financial gain. What effect will such a result have on our military's morale?

Similarly, consider the effect of the *Deutsch* decision on foreign countries, their nationals, and their private companies. They now have a roadmap to the torture and exploitation of American Prisoners of War during time of conflict which will be free of redress. This result is patently wrong, and calls for resolution by the highest Court in our land.

In addition, the Ninth Circuit's denial of Petitioners' rights to compensation from the private Japanese companies who harmed them is based upon a misinterpretation of the Multilateral Treaty of Peace with Japan [1952] 3 U.S.T 3169, TIAS 2490 (1951) ("the 1951 Treaty").[8] A review of the

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[8] The full text of the 1951 Treaty is set forth in the Petition at pages 87-a through 121-a, and is incorporated herein by reference.

1951 Treaty discloses no express intention to wholly preclude common law tort claims by American citizens against private Japanese corporations for conduct which occurred while the countries were at war. Rather, the Treaty's immunity protection is ***expressly limited*** to claims against "Japan and its nationals arising out of acts taken by Japan and its nationals ***in the course of the prosecution of the war***." 1951 Treaty, Paragraph 14(b), *supra*, 3 U.S.T. at p. 3183 (Emphasis added). A review of the claims of Petitioners herein discloses that no such rights are alleged or sought to be enforced. The claims before this Court are those of American citizens against Japanese corporations (and their American sub-entities) for acts which were undertaken by those Japanese corporations ***for their private gain***.[9] Clearly, the efforts of these private companies were not the acts of the Japanese government which itself was "*prosecuting*" the war against the Allied Powers. Rather, they were the acts of private industry undertaken for private greed - - free labor - - and profit.[10] Thus, the Ninth Circuit erred in ruling that

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[9] Article 31 of the Geneva Convention Relating to the Treatment of Prisoners of War, 47 Stat. 2021, T.S. 846 (1929), allowed Prisoners of War to be forced to do labor, but ***expressly precluded*** such labor from having any connection with the operation of the war (such as putting Prisoners of War to work making munitions). Thus, Respondents will be hard-pressed to argue that their actions were undertaken "in the course of the prosecution of the war" without expressly admitting a violation of the Geneva Convention, a concession that Respondents have yet to make.

[10] While this forced labor may have ultimately benefitted the Japanese "war economy" in that the mined materials were utilized to manufacture munitions, the direct beneficiaries were Mitsui, Mitsubishi and other private companies who lined their pockets with the fruits of the free forced labor. This action properly seeks the disgorgement of those ill-gotten gains for the benefit of the American citizens who suffered this grave injustice.

these private companies were acting "*in the course of the prosecution of the war.*" Amici urge this Honorable Court to construe the 1951 Treaty to ensure that the rights of American soldiers and citizens - - past, present and future - - are protected.

Moreover, a review of the 1951 Treaty discloses indicia of an intent ***not*** to immunize private Japanese corporations from such claims. As pointed out by Petitioners in their Petition, when one compares the scope of the post-Treaty immunity granted to the prevailing Allied Powers with those granted to the defeated Japanese, the distinction between the immunities, and thus the impropriety of the Ninth Circuit's decision in *Deutsch*, becomes clear. Paragraph 19(a) of the 1951 Treaty grants immunity to the Allied Powers for "all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war ***or out of actions taken because of the existence of a state of war.***" 1951Treaty, Paragraph 19(a), *supra*, 3 U.S.T. at p. 3187 - 3188 (Emphasis added).

The expansiveness of the immunity language of paragraph 19(a), when compared with the more limited immunity granted to Japan by Paragraph 14(b) for "acts taken by Japan and its nationals *in the course of the prosecution of the war*," is the yardstick by which this case should be decided. Had Japan and its nationals been afforded immunity for "*actions taken because of the existence of a state of war*," then the decision of the Ninth Circuit in *Deutsch* might have been well reasoned. Clearly, the actions of the Respondents herein were taken "*because of the existence of a state of war.*" However, those same actions were ***not*** taken "*in the course of the prosecution of the war*," as Mitsui, Mitsubishi and their Co-Respondents neither declared nor prosecuted a war

against the United States and the Allied Powers.[11] Thus, based upon the negotiated language of the 1951 Treaty, the Respondents herein do not enjoy immunity for their private actions undertaken for corporate greed and profit. Amici respectfully urge this Court to grant Petitioners' Petition for a Writ of Certiorari, and to reverse the plainly erroneous decision of the Ninth Circuit in *Deutsch.*

B. Review is Needed to Secure Uniformity of Decision

A second basis for granting certiorari is the existence of a split of authority between California Courts, and between the California Courts and the Federal Courts, over the application of Section 354.6 and the doctrine of "express preemption" by virtue of the federal government's foreign affairs power. Because of the legal, moral and social importance of the issues presented, amici respectfully submit that this Honorable Court should grant certiorari and resolve this split of authority.

Deutsch, supra, 317 F.3d 1005, and *Mitsubishi Materials Corp. v. Superior Court* (2003) 106 Cal.App.4th 39, __ Cal.Rptr.2d __ [Fourth District], each hold Section 354.6 unconstitutional, *Deutsch* based upon a "foreign affairs power" analysis, and *Mitsubishi Materials* based upon an "express preemption" analysis. By contrast, *Taiheiyo Cement Corp. v. Superior Court* (2003) 105 Cal.App.4th 398, 129 Cal.Rptr.2d 451 [Second District], holds that Section 354.6 passes Constitutional muster based upon an "express

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[11] See, e.g., *Kawakita v. United States* (1952) 343 U.S. 717, 727 - 728, 72 S.Ct. 950, 957 - 958, 96 L.Ed. 1249 [The fact that a company was part of the Japanese "*war economy*" did not change its status from private to governmental].

preemption" analysis. These decisions are in direct conflict,[12] and may lead to disparate results for similarly situated parties.[13]

Amici respectfully submit that *Taiheiyo Cement* is the most solidly reasoned decision. It considers the language and intent of the 1951 Treaty, and allows the scope of the Treaty's immunities to be decided by a jury rather than being usurped by the Courts at the pleading stage.[14] Under an express preemption analysis, the law requires just that, ***express*** preemption. See, e.g., *Metropolitan Life Ins. Co. v. Massachusetts* (1985) 471 U.S. 724, 738, 105 S.Ct. 2380,

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[12] The California Supreme Court has granted Petitions for Review in *Mitsubishi Materials* and *Taiheiyo Cement* to resolve this conflict. See, *Taiheiyo Cement Corp. v. Superior Court*, 66 P.3d 1231, 133 Cal.Rptr.2d 147, 2003 Daily Journal D.A.R. 4776 (Cal., Apr 30, 2003) (NO. S113759); *Mitsubishi Materials Corp. v. Superior Court*, 133 Cal.Rptr.2d 147, 2003 Daily Journal D.A.R. 4798 (Cal., Apr 30, 2003) (NO. S114470).

[13] Particularly frustrating from the standpoint of amici is the fact that *Taiheiyo Cement* involves the claims of Jae Won Jeong, a former Korean national who is now a naturalized American citizen, who did not serve in the United States' armed forces, while the instant matter involves the claims of Petitioner Lester Tenney and others who are natural born Americans who were either conscripted into or voluntarily enlisted for military duty on behalf of the United States during World War II. Consider the incongruity of results - - if the present state of the decisional law stands, the naturalized Korean-American citizen who was forced into slave labor prior to his American naturalization will have a claim for damages, while the natural-born American heroes will be left out in the cold. Amici respectfully submit that such a result cannot stand.

[14] All of these conflicting cases were decided by the Trial Courts on Demurrers and/or Motions for Judgment on the Pleadings.

2388, 85 L.Ed.2d 728; *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516-518, 112 S.Ct. 2608, 2617 - 2618, 120 L.Ed.2d 407; see also *Tafflin v. Levitt* (1990) 493 U.S. 455, 466, 110 S.Ct. 792, 798 - 799, 107 L.Ed.2d 887. Implied preemption is insufficient; rather, the drafters of the statute, or in this case the 1951 Treaty, in question must expressly preempt the claim sought to be enforced. As the analysis set forth *supra* (at pp. 3 - 6) explains, the language of the 1951 Treaty does not expressly preempt Petitioners' claims. Only claims for "acts taken by Japan and its nationals *in the course of the prosecution of the war*" are preempted. At a very minimum, Petitioners are entitled to have a jury determine whether the acts of private Japanese companies in utilizing forced slave labor of American citizens is "*in the course of the prosecution of the war.*"

Similarly, the Ninth Circuit's application of the foreign affairs power doctrine in *Deutsch* is misplaced. Section 354.6 is not an intrusion into foreign affairs. Rather, it seeks to permit state common law claims arising from the tortious conduct of private companies doing business in California against present California residents. Although these wrongs occurred during wartime, they were perpetrated for the ***private financial benefit*** of Mitsui, Mitsubishi, and other similarly situated companies. Requiring those Japanese companies [and their present-day California subsidiaries and successors] to compensate American citizens for the value of their forced slave labor is neither unfair nor inappropriate.

The decision in *Taiheiyo Cement* is well-reasoned, and protects the rights of individual citizens against the horrendous tortious conduct alleged. By contrast, the decisions in *Deutsch* and *Mitsubishi Materials* are incorrect, perpetrate a grave injustice on true American heroes, and should not stand. Amici respectfully submit that the requested Writ of Certiorari should be granted, and that the

inconsistency of decision and result between these two lines of cases should be resolved by the United States Supreme Court.

CONCLUSION

The *Tenney* and *Deutsch* cases raise very significant, serious and important issues of grave national importance. In the view of the amici, the Ninth Circuit has stripped the Petitioners in *Tenney* of their fundamental constitutional rights based upon a misguided analysis of the 1951 Treaty of Peace with Japan. In the interest of justice for our World War II Prisoners of War, for our present-day soldiers, and for the soldiers of future generations, it is respectfully requested that the United States Supreme Court grant Petitioner Lester Tenney's Petition for a Writ of Certiorari and to reverse the decision of the Court of Appeal of the Ninth Circuit.

Respectfully submitted,

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